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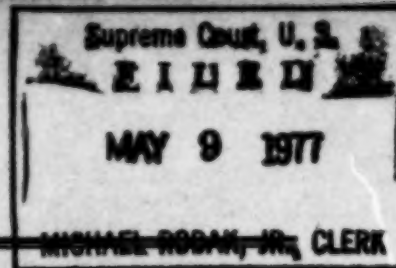
attorney for \_\_\_\_\_, 19\_\_\_\_\_, by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at \_\_\_\_\_

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Attorney \_\_\_\_\_ for \_\_\_\_\_

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Attorney \_\_\_\_\_ for \_\_\_\_\_



# In the Supreme Court

of the United States

OCTOBER TERM, 1976

No. 76-1368

PACIFIC POWER & LIGHT COMPANY,  
*Appellant,*

v.

THE DEPARTMENT OF REVENUE OF  
THE STATE OF MONTANA,  
*Appellee.*

*Appeal from the Supreme Court of the  
State of Montana*

## APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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Appellee's Motion to Dismiss for lack of jurisdiction should be denied. This Court has jurisdiction because the constitutionality of the application of Montana's property tax assessment statute was drawn into question continually throughout the proceedings and the Montana Supreme Court's reversal of the Montana District Court and its rejection of appellant's constitutional arguments resulted in the upholding of the validity of the application of the Montana statute after the issue of its repugnancy to the Constitution

was specifically drawn into question. In *Dahnke-Walker Miller Co. v. Bondurant*, 257 U.S. 282, 289 (1921) this Court explained that jurisdiction is proper not only when the validity of a state statute, itself, is drawn into question, but also when the authority exercised under the statute is questioned and when the lower court's decision is in favor of the authority exercised. This is true even if the state court's decision is based on other grounds:

"That the statute was not claimed to be invalid in toto and for every purpose does not matter. . . . Neither does it matter on what ground the court upheld and enforced the statute. . . . If it be resolved in favor of the validity of the statute, the review may be on writ of error; . . . The provisions take no account of the particular ground or reasons on which the decision is put."

Appellant should not be penalized when it continually raised the constitutional issues, as documented in appellant's Jurisdictional Statement, simply because the Montana Supreme Court wrongfully ignored the constitutional argument. In *New York Ex. Rel. George W. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) this Court explained:

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record

as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

"Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

Appellee cites a number of cases which it claims supports its argument that this Court does not have jurisdiction because the constitutionality of appellee's application of the Montana tax assessment statute was not drawn into question. None of the cases cited are applicable to the case at bar. They involve factual situations in which the appellant had failed to raise the constitutional issues in the lower court. In the case at bar, appellant raised the unconstitutionality of appellee's property tax assessment as early as the original hearing before the Montana State Tax Appeal Board as documented in appellant's Jurisdictional Statement.

Appellee next challenges appellant's Jurisdictional Statement by arguing that no substantial federal question is presented, that the Montana Supreme Court judgment rested on an adequate non-federal basis, that the manner in which the constitutional question was raised was not shown and that no federal question has been raised which would permit jurisdiction if the appeal were treated as a petition for writ of certiorari. Appellee does not support these arguments. Instead it attempts to justify its position and its meth-



od of tax assessment by defining the issue as the applicability and constitutionality of the unitary rule method of property tax valuation. Appellee compares its tax assessment method and appellant's method (which was adopted by the Montana State Tax Appeal Board and the Montana District Court) and concludes that its method does not violate the Constitution because it is defined as the unitary method of valuation.

The questions presented in this case are more complex than the validity of the unitary method of valuation. The issues which must be addressed and which have been ignored by both appellee and the Montana Supreme Court, are (1) whether one of three indicators which appellee used to value appellant's Montana property as part of the unitary valuation method is constitutional when that indicator is based on appellant's property outside Montana due to peculiar factual circumstances of appellant's interstate operations and (2) whether allocation of property for ad valorem tax purposes between Montana and other states (which is a question completely separate from the unitary method of valuation) is constitutional.

Appellee argues that appellant attempts to circumvent previous rulings upholding the unitary method of valuation. Appellant's main challenge to the Montana tax assessment, however, is not made against the unitary method of valuation, but rather against the allocation of values *after* such values are established by the unitary method of valuation. It is this *allocation* which the District Court of Montana specifically found to be "at variance with the express goal of the Department [appellee] to assess only that property of respondent

located in Montana." Findings of Fact and Conclusions of Law of the District Court of the State of Montana in and for the County of Lewis and Clark, December 18, 1975.

Once the focus of this case is directed to the actual issues involved, it is clear that appellant has raised the unconstitutionality of appellee's application of the tax assessment statute throughout the proceedings, that the Montana State Tax Appeal Board and the Montana District Court ruled in favor of appellant for the reason that appellee's tax assessment improperly taxed appellant's property outside the State of Montana and that the decision of the Montana Supreme Court necessarily rejected this claim of unconstitutionality by upholding the validity of appellee's application of the Montana tax assessment statute.

For all the reasons outlined above appellee's Motion to Dismiss should be denied.

Respectfully submitted,

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